Supreme Court, U.S.
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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

APPLE COMPUTER, INC.,
Petitioner,

v.

MICROSOFT CORPORATION AND
HEWLETT-PACKARD COMPANY,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Questions Presented

What is the extent of copyright protection available to computer graphical user interfaces? Specifically:

a. Are computer graphical user interfaces entitled to only "thin" protection against copying under a standard of "virtual identicality" (the test applicable to factual and other works of limited creative content) rather than "substantial similarity" (the test applicable to artistic and literary works)?

b. Is the standard of protection for a computer graphical user interface subject to diminution by judicial "dissection" of the work and "filtration" of those "elements" the court deems licensed or unprotectible, without regard to the defendant's copying of the creative aspects of the work as a whole?

Parties to the Proceeding

Petitioner is Apple Computer, Inc. In the proceeding before the Ninth Circuit, Apple was the Plaintiff-Appellant-Cross-Appellee, and Microsoft Corporation and Hewlett-Packard Company were the Defendants-Appellees-Cross-Appellants.

Rule 29.1 Statement

Apple Computer, Inc. has no parent companies or subsidiaries (except wholly owned subsidiaries).

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Apple Computer, Inc. respectfully petitions this Court for issuance of a writ of certiorari to review the judgment entered by the United States Court of Appeals for the Ninth Circuit in this case on September 19, 1994.

OPINIONS BELOW

The opinion of the court of appeals (App. 1A-24A) is reported at 35 F.3d 1435.

The opinions of the district court are reported at or identified as: 709 F. Supp. 925 (March 20, 1989) (App. 25A-36A); 717 F. Supp. 1428 (July 25, 1989) (App. 37A-49A); 759 F. Supp. 1444 (March 6, 1991) (App. 50A-69A); Order of June 15, 1991 (App. 70A-75A); Order of July 25, 1991 (App. 76A-86A); 779 F. Supp. 133 (August 14, 1991) (App. 87A-92A); Order of April 15, 1992 (App. 93A-94A); 799 F. Supp. 1006 (August 10, 1992) (App. 95A-156A); Order of April 14, 1993 (App. 157A-163A); 821 F. Supp. 616 (May 18, 1993) (App. 164A-191A); Order of June 8, 1993 (App. 192A-193A).

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on September 19, 1994. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Article 1, § 8

17 U.S.C. § 101

17 U.S.C. § 102

17 U.S.C. § 103

17 U.S.C. § 106

Fed. R. Civ. P. 56

The pertinent text of the constitutional and statutory provisions is set forth in the Appendix (194A-199A).

STATEMENT OF THE CASE

A. The Material Facts.

Apple introduced its Macintosh personal computer in 1984 (preceded by the Lisa computer introduced in 1983). The Macintosh was a great success "largely because of its distinctive user friendly graphic user interface" [709 F.

Supp. at 926 (App. at 26A); 759 F. Supp. at 1447 (App. at 50A-51A)]—which is the subject of this profoundly important litigation.[1]

In mid-1985, Microsoft announced that it intended to offer a graphical user interface for IBM PC and PC-compatible personal computers, to be known as "Windows," to compete with the Macintosh graphical user interface. On inspection of Windows 1.0, Apple informed Microsoft that, in Apple's view, the Microsoft work violated Apple's audiovisual copyrights. Microsoft's Chairman Bill Gates claimed that Windows 1.0 did ***not*** infringe Apple's works because, inter alia, it had "a tiled [windowing] system" instead of overlapping windows such as appeared in the Macintosh graphical user interface. [CR 232 (Gates)[2]]

Mr. Gates' denial, however, soon became inoperative when Apple's claim was resolved by an agreement dated November 22, 1985. In that agreement, inter alia, (i) Microsoft acknowledged that "the visual displays in the above-listed Microsoft programs [Windows 1.0 and five Microsoft application programs] are derivative works of the visual displays generated by Apple's Lisa and Macintosh graphic user interface programs"; (ii) Apple granted to Microsoft, in a section entitled "Visual Copyright License from Apple," a non-exclusive license "to use [and sublicense] these derivative works in present and future software programs"; and (iii) Apple waived "any other . . . claim or right it may have as to Microsoft® Windows Version 1.0." [CR 470 (Ex. B, ¶¶ 1, 2A, 4)] *See also* 709 F. Supp. at 926-27 (App. at 26A-27A).

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[1] A graphical user interface is a series of interactive, animated screen displays providing a means of user-computer communication, allowing the user to instruct the computer utilizing graphical symbols instead of character-based keyboard commands. The visual displays are created by computer code (instructions) usually embedded in semiconductor memory.

[2] All "CR" references are to the transcript of record submitted to the court of appeals.

In November 1987, Microsoft released a new version of its Windows program, Windows 2.03. [CR 232 (Remala)] It described its new version as "fundamental[ly]" and "substantial[ly]" different from Windows 1.0, a "new visual interface with overlapping windows." [CR 232 (Exs. 91, 85); 709 F. Supp. at 930-31 (App. at 34A)] The change from tiled to overlapping windows alone required many changes in visual displays and altered the character of the overall design. *See* 709 F. Supp. at 931 (App. at 34A) ("[I]t cannot be disputed that Windows 2.03 is significantly different from Windows 1.0 [a]nd this difference is significant to Apple."); 717 F. Supp. at 1434 (App. at 47A) ("This change had a direct effect on the appearance and manipulation of windows and required many changes in visual displays.").

Also in November 1987, Hewlett-Packard announced its operating environment program called "NewWave" which it described as an "extension" and an "enhancement" of Microsoft Windows "similar to the Macintosh, but with more features." [CR 470 (Exs. F, G); CR 472 (Grabner), (McDonnell)]

On March 17, 1988, after inspection of defendants' products, Apple sued, alleging that Windows 2.03 and NewWave exceeded the authorization of the 1985 license; a jury trial was demanded. [CR 1] The basis for federal jurisdiction was 28 U.S.C. § 1331 and 1338(a) in that the action arose under the Copyright Act, 17 U.S.C. § 101 et seq.

In 1990, Windows 3.0 and NewWave 3.0 were introduced. [CR 470 (Ex. I)] Windows 3.0 creates an interface even more similar in appearance to the Macintosh than did either Windows 1.0 or 2.03 [CR 475 (Galler ¶ 6 (Laserdisc))]; NewWave 3.0 is no less similar to the Macintosh in overall appearance than was the original NewWave. Both Windows 3.0 and NewWave 3.0 were added as accused products by Apple's supplemental complaint. [CR 330 ¶¶ 12-13, 15]

Microsoft's first defense was that Windows 2.03 was licensed by the 1985 Apple-Microsoft agreement. The

district court ruled that, interpreting the term "visual displays" as "elements" of the Macintosh interface, there were "elements" that were not licensed. They were (i) the changes made from the tiled windowing system used in Windows 1.0 to the overlapping windowing system used in the defendants' accused works; and (ii) the changes made in "the appearance and use of icons." 717 F. Supp. at 1434 (App. at 47A).

Apple then submitted its motion for summary judgment as to liability on the ground that defendants' works were unauthorized "derivative works,"[3] and defendants submitted motions for summary judgment on the asserted grounds that Apple's works were lacking in originality or otherwise did not reflect protectible expression. The evidence submitted overwhelmingly established that:

1. Apple's works were "distinctive" and original;

2. Defendants' accused works were substantially similar to Apple's original works—much more so than Windows 1.0, the visual displays of which Microsoft had stipulated were derivatives of Apple's graphical user interface audiovisual works; and

3. There were myriad design alternatives available to defendants in depicting virtually every aspect of Apple's works, including ***un***licensed "visual displays," and a fortiori in depicting the unique

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[3] A copyright owner has the exclusive right "to prepare derivative works" under 17 U.S.C. § 106(2). *See Oddo v. Ries*, 743 F.2d 630, 634 (9th Cir. 1984) ("derivative works . . . necessarily infringe" copyrights unless copyright holder granted permission for use); *Mirage Editions, Inc. v. Albuquerque A.R.T. Co.*, 856 F.2d 1341, 1343 (9th Cir. 1988) (affirming summary judgment of infringement as to derivative works), *cert. denied*, 489 U.S. 1018 (1989).

Proof of "substantial similarity," combined with proof of access (which was here conceded), is the traditional method of proving illegal copying. *See Sid & Marty Krofft Television Prods. v. McDonald's Corp.*, 562 F.2d 1157, 1162 (9th Cir. 1977).

arrangement of features and animation created by Apple's designers.

The depth of the evidence referred to is illustrated by selected excerpts reproduced in the Appendix submitted herewith, Part III. In brief:

1. **Originality.**

The originality of Apple's works was established by the testimony of numerous witnesses. The Macintosh interface was hailed even by Microsoft's Chairman Gates as providing "the most innovative environment in personal computing." [CR 471 (Ex. AG)] Indeed, prior to its employment of its deconstructionist "dissection and filtration" analysis, the originality of Apple's works was explicitly adjudicated by the district court [*see* 759 F. Supp. at 1453-56 (App. at 62A-68A) (*e.g.* at 1454 (App. at 65A): "HP's contention that Apple's copyrighted works are derivative works is meritless.")]. There was no dispute that Apple's interface "was unique in its overall arrangement and presentation of graphic features." [CR 231 (Atkinson ¶¶ 5, 8-13)]

2. **Substantial Similarity.**

The substantial similarity of defendants' works to Apple's works was evident from a comparison of the works and established virtually beyond fair dispute by the testimony of numerous knowledgeable witnesses and defendants' admissions.[4]

An advertising campaign for Windows 3.0 by one of Microsoft's largest customers was designed to emphasize "***an***

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[4] A Microsoft document quoted a Windows application designer as stating "[f]rom the user's point of view and the programmer's point of view, they're very similar." Craig Stinson, *SQL Windows Brings a Graphical User Interface to SQL Database Applications*, Microsoft Systems Journal, May 1988 [CR 607 (Abel Ex. 8)].

An internal memorandum to Microsoft's Chairman Bill Gates included a comment that "[t]his sure looks like a Mac. Is this legal?" [Allison Memo to Bill Gates et al., Dec. 19, 1989 (CR 607 (Abel Ex. 3))]

amazingly similar look and feel" to the Macintosh interface. [CR 470, Ex. V (emphasis added)]

Hewlett-Packard's NewWave, also introduced in November 1987, was built "on top of" Windows 2.03. A 1987 Microsoft review of the NewWave graphical user interface—sent to Microsoft's "upper management executives," including Microsoft's Chairman Gates [CR 472 (Grabner)]—found that "***[t]he desktop [in NewWave] is similar to the Macintosh Finder—The look and feel of the user interface is strikingly similar.***" [CR 470 (Ex. F) (emphasis added)] A Hewlett-Packard advertisement quoted from various industry reviews emphasizing the "***strong resemblance [of Hewlett-Packard's NewWave] to the Macintosh desktop.***" [CR 471 (Ex. AA) (emphasis added)]

3. Alternative Designs.

The evidence was equally decisive in proving that, as to every feature, and a fortiori as to the unique arrangement created by Apple, there were many design alternatives available to defendants. Indeed, the alternatives were "almost without restriction, limited mainly by the human imagination." [CR 229 (Wagner ¶ 2)]

The declaration of Apple interface designer Annette Wagner, providing examples of a variety of different designs developed in a two-hour exercise, provided proof positive of the availability of different expressions for user interface design. [CR 229 (Wagner ¶ 4, Ex. 1)][5] Professor Ben Shneiderman provided still other examples of numerous design alternatives that he had encountered. [See CR 227 (Shneiderman ¶¶ 15, 17, 19)]

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[5] The district court ridiculed one of the designs as "hyperbole" "go[ing] so far as to exhibit . . . a computer screen containing the image of a desk!" 799 F. Supp. at 1022 (App. at 109A). But, in January, 1994, General Magic introduced a competing interface design known as "The Magic Cap Desk," adopted by Sony Corp. and Motorola, Inc. (now available in the "Sony Magic Link").

Illustratively, the pertinent evidence is that there are "an infinite number of ways" to arrange windows so that they overlap [CR 260 (Tesler)] and "numerous ways [that] windows may be animated to be moved, sized, activated, inactivated, opened or closed" [CR 227 (Shneiderman ¶ 16)]. It is true that many other graphical user interfaces (almost all published *after* Microsoft copied the Apple interface) also employed overlapping windows, but, significantly, none (except those, such as IBM, licensed by Apple) created the "striking similarity" to Apple's Macintosh interface deliberately adopted in defendants' accused works and about which defendants boasted in the advertising and marketing of their products.

Overall, the evidence showed that there was no reason whatever (other than to cash in on the popularity of the Macintosh design) why "Microsoft and Hewlett-Packard were required to adopt an appearance . . . substantially similar to that of the Macintosh." [CR 227 (Shneiderman ¶ 14)]

B. The Decisions Below.

The issues here presented for review arose from a series of rulings by the district court granting defendants' summary judgment motions. Those rulings held, inter alia, that:

> The elements of such an arrangement [the Macintosh interface] serve a purely functional purpose in the same way that the visual displays and user commands of the dashboard, steering wheel, gear shift, brakes, clutch and accelerator serve as the user interface of an automobile. Purely functional items or an arrangement of them for functional purposes are wholly beyond the realm of copyright . . . .
>
> Under the law of [the Ninth] Circuit, an article which has "*any* intrinsic utilitarian function" can be denied copyright protection "except to the extent that its artistic features

> can be identified separately and are capable of existing independently as a work of art." . . . Copyright protection can attach only to such a product's separate artistic features or can afford only such limited protection as appropriate when its features are the product of a compilation.

799 F. Supp. at 1023 (App. at 110A-111A) (citations omitted).

Based on those holdings, the district court "dissected" and "filtered out" from any infringement analysis every detailed "element" of Apple's copyrighted works that the court considered to be either (i) licensed pursuant to the 1985 Microsoft agreement pertaining to the "visual displays" of Windows 1.0; or (ii) unprotectible, standing alone and considered in isolation, as a matter of copyright law. What was left, the district court held, was protectible only under a standard of "virtual identity." 821 F. Supp. at 623 (App. at 174A).[6]

All parties stipulated that "it would be in the best interest of judicial economy and efficiency to obtain an early review of those rulings." [CR 672(a), at 2] Based on that recognition, without conceding any merit in defendants' positions, Apple filed a statement of non-opposition to defendants' motions for summary judgment based on the lack of "virtual identicality" with Apple's Lisa Desktop (the district court having also dismissed Apple's reliance on its Macintosh Finder audiovisual work). The court granted defendants' motions "based upon the non-opposition." [CR 678, at 2]

The court of appeals affirmed the rulings referred to. Specifically, noting that its affirmance rested on its view

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[6] "Virtually identical" is generally defined in the Ninth Circuit as "verbatim" [*Johnson Controls, Inc. v. Phoenix Control Sys., Inc.*, 886 F.2d 1173, 1175 (9th Cir. 1989)] or as "bodily appropriation" [*Harper House, Inc. v. Thomas Nelson, Inc.*, 889 F.2d 197, 205 (9th Cir. 1989)].

that "the district court's *approach* was correct" [35 F.3d at 1438 n.5 (App. at 3A)], the court of appeals held that:

> (i) Contrary to the rulings of the Federal Circuit in *Atari Games Corp. v. Nintendo of Am., Inc.*, 975 F.2d 832 (Fed. Cir. 1992), and of other circuit courts of appeal utilizing the traditional infringement standard of "substantial similarity," "the appropriate standard for illicit copying [of computer graphical user interfaces] is virtual identity" because computer graphical user interfaces are "partly functional . . . a tool to facilitate communication between the user and the computer" [35 F.3d at 1439, 1444 (App. at 5A, 15A)].
>
> (ii) Contrary to the import of the Third Circuit ruling in *Whelan Assocs. v. Jaslow Dental Lab.*, 797 F.2d 1222 (3d Cir. 1986), *cert. denied*, 479 U.S. 1031 (1987), and rulings of other courts in other circuits as well, copyright protection in effect is not available for the structure, sequence and organization of a computer graphical user interface, that is, for the work as a whole [35 F.3d at 1445 (App. at 16A-17A)].[7]
>
> (iii) Contrary to the Tenth Circuit ruling in *Gates Rubber Co. v. Bando Chem. Indus.*, 9 F.3d 823 (10th Cir. 1993), the dissection and filtration process (applied by the court to exclude all "elements" considered to be either licensed or unprotectible) was to be applied *before* any consideration of the works as a whole [35 F.3d at 1443 (App. at 12A)].

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[7] The court of appeals specifically rejected Apple's infringement case based on copying of the Macintosh interface as a whole, as it was perceived by users; the court held that "protection extends only to those components of a work that are original." 35 F.3d at 1445 (App. at 16A). The court did acknowledge that "original selection and arrangement of otherwise uncopyrightable components may be protectable," but it then patently ignored that principle. *Id.*

REASONS FOR GRANTING THE WRIT

A. The Ninth Circuit "Virtual Identicality" Infringement Standard for Graphical User Interfaces Threatens to Deprive Computer Software of Any Meaningful Copyright Protection. Such "Thin Protection" Is Incompatible with the Software Protection Act of 1980 and Cannot Be Justified by Characterizing Computer Graphical User Interfaces As "Partly Functional" or Otherwise.

This case is not only the most celebrated, it is, because of the rulings below, the most significant copyright case of recent times. Review is required to restore the integrity of the copyright law protection for computer software provided by the Copyright Act.

The ruling that graphical user interfaces are to be protected against only "virtually identical copying" robs computer software of ***any*** meaningful copyright protection. The copying of both computer programs[8] and screen displays[9] can easily be disguised and manipulated so as to avoid "virtual identicality"—especially when what is copied

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[8] *See* Anthony L. Clapes et al., *Silicon Epics and Binary Bards: Determining the Proper Scope of Copyright Protection for Computer Programs*, 34 UCLA L. Rev. 1493, 1577 (1987); Steering Committee for Intellectual Property Issues in Software et al., National Research Council, *Intellectual Property Issues in Software* 78 (1991) (explanation by committee member Peter Schneider that changes "can yield a program that, although the product of illegal copying, bears little, if any, provable resemblance to the original").

[9] *See Stern Elecs., Inc. v. Kaufman*, 669 F.2d 852, 855 (2d Cir. 1982) (computer screen displays of video game must be protectible as an audiovisual work because "a determined competitor [can] manufactur[e] a 'knock-off' of [the video game] that replicates precisely the sights and sounds of the game's audiovisual display"); *M. Kramer Mfg. Co. v. Andrews*, 783 F.2d 421, 436-37 (4th Cir. 1986) (similar); *see also* Kenneth W. Dam, *Some Economic Considerations in the Intellectual Property Protection of Software* 10-11 (Chicago Law & Economics Working Paper No. 26, 2d series, 1994) (forthcoming 1995 in J. Legal Stud.).

is the arrangement or the "nonliteral aspects" of the original work.[10] Thus, the standard of "virtual identicality" provides, in practical effect, no protection at all.

American companies are leaders in the production of innovative computer software, including graphical user interfaces, and the United States has been a leading proponent of meaningful protection for computer software.[11] Any significant weakening of meaningful

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[10] It is widely recognized that the nonliteral aspects of literary and audiovisual works are to be protected. *See, e.g., Stewart v. Abend*, 495 U.S. 207, 238 (1990) (noting that a motion picture may infringe a book by using "the story's unique setting, characters, plot, and sequence of events"); *Kepner-Tregoe, Inc. v. Leadership Software, Inc.*, 12 F.3d 527, 536 n.20 (5th Cir.) (approving the "general, noncontroversial proposition that nonliteral aspects of copyrighted works—like structure, sequence, and organization—*may* be protected under copyright law"), *cert. denied*, 115 S. Ct. 82 (1994); *Whelan Assocs. v. Jaslow Dental Lab.*, 797 F.2d 1222, 1248 (3d Cir. 1986) (protecting "structure, sequence, and organization" of a computer program), *cert. denied*, 479 U.S. 1031 (1987); *Lotus Dev. Corp. v. Paperback Software Int'l*, 740 F. Supp. 37, 51-52 (D. Mass. 1990) (copying "of nonliteral expression, if sufficiently extensive, has never been upheld as permissible copying").

[11] *See* Richard A. Morford, Deputy Director for the Economic Section, Office of Japanese Affairs, Department of State, *Intellectual Property Protection: A United States Priority*, 19 Ga. J. Int'l & Comp. L. 336, 336 (1989) ("The United States is the largest producer of copyrighted works and the heaviest investor in basic research and development in the world. Clearly we have an interest in better protection of intellectual property both at home and abroad."); Carol J. Bilzi, *Towards an Intellectual Property Agreement in the GATT: View from the Private Sector*, 19 Ga. J. Int'l & Comp. L. 343, 345 (1989) ("There is a direct link between the protection of intellectual property rights and U.S. international competitiveness. United States companies simply will not have the incentive to invest in research and development unless they can reap the financial benefits of developing new technology."); U.S. Dep't of Commerce, *U.S. Industrial Outlook 1994*, at 27-5 (1994) ("U.S. vendors supplied 74 percent of the world packaged software market" of $47.6 billion in 1992); Susan Wagner, *New Commissioner Deeply Involved in Copyright*, Publishers Wkly., Apr. 4, 1994, at 40 (report by Bruce Lehman, Commissioner of Patents and Trademarks and Assistant Secretary of Commerce, on the value of copyright protection for computer software).

protection in the United States would be quickly exploited by copiers throughout the world, with powerful incentives to do so.[12] Foreign courts may be expected to follow the lead of American courts in that direction. Indeed, a Canadian court already has cited the district court's opinion for its extreme dissection approach and its likening of the Apple Macintosh's graphical user interface to a "dashboard, steering wheel, gear shift, brakes, clutch and accelerator . . . of an automobile." *Carolian Sys. v. Triolet Sys. Inc.*, No. 12515/86, 1993 Ont. C.J. LEXIS 219, at *68-72 (Feb. 12, 1993). The enormous loss to the nation's economy that will inevitably result from such a diminished view of copyright protection for computer software is incalculable.

In the United States, the Ninth Circuit is the only circuit that has adopted a "virtually identical" infringement standard for graphical user interfaces and rejected comparison of such works as a whole under the "substantial similarity" standard. In so departing from traditional legal norms, the court below has created conflicts among the circuits and uncertainty in an important area of the law. Other circuits have utilized the infringement standard of "substantial similarity" in computer software cases involving both computer code and screen displays. *See, e.g., Atari Games Corp. v. Nintendo of Am., Inc.*, 975 F.2d 832, 844-45 (Fed. Cir. 1992) (affirming preliminary injunction against use of infringing computer program after engaging in substantial similarity analysis); *Whelan Assocs. v. Jaslow Dental Lab.*, 797 F.2d 1222, 1242-48 (3d Cir. 1986) (affirming copyright infringement judgment and substantial similarity analysis of computer programs), *cert. denied*, 479 U.S. 1031

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[12] *See* Kenneth W. Dam, *Some Economic Considerations in the Intellectual Property Protection of Software* 12 (Chicago Law & Economics Working Paper No. 26, 2d series, 1994) (forthcoming 1995 in J. Legal Stud.) (describing "[p]owerful commercial motives for the follow-on companies to make the user interfaces as close as possible to the innovator's user interface"); *id.* at 2 n.3 (noting that software protection remains "grossly undeveloped" in many countries, including those where the law on the books promises protection).

(1987); *M. Kramer Mfg. Co. v. Andrews*, 783 F.2d 421, 445-46 (4th Cir. 1986) (analyzing infringement of computer program and audio/visual aspects of computer videogame for direct evidence of copying and substantial similarity).[13] All circuits, including the Ninth Circuit, have utilized the substantial similarity standard in a great variety of other cases involving non-factual works.[14]

The characterization of graphical user interfaces as either "purely" or "partly" "functional . . . a tool to facilitate communication" cannot justify adoption of the

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[13] *See also GNU Business Info. Sys., Inc. v. Social Secretary, Ltd.*, No. 91 C 8215, 1993 WL 469919, at *3 (N.D. Ill. Nov. 12, 1993) (denying defendants' motion for summary judgment due to material question of fact regarding substantial similarity of computer programs as a whole); *Consul Tec Inc. v. Interface Sys. Inc.*, 22 U.S.P.Q.2d 1538, 1541 (E.D. Mich. 1991) (granting permanent injunction against copyright infringement of computer program's user interface where accused program was found to be "substantially similar to [copyrighted program] in significant respects"); *Manufacturers Technologies, Inc. v. Cams, Inc.*, 706 F. Supp. 984, 1000-02 (D. Conn. 1989) (granting permanent injunction against infringement of computer program's screen displays after applying the substantial similarity test which showed illicit copying of the "sequence and flow" and protected expression of certain screen displays); *E.F. Johnson Co. v. Uniden Corp. of Am.*, 623 F. Supp. 1485, 1492-98 (D. Minn. 1985) (preliminarily enjoining defendant from copyright infringement of computer software program where defendant's program was substantially similar to copyrighted program); *SAS Inst., Inc. v. S & H Computer Sys., Inc.*, 605 F. Supp. 816, 829-30 (M.D. Tenn. 1985) (granting injunction against copyright infringement of computer program upon substantial similarity analysis of the programs at issue).

[14] *See, e.g., Worldlife Express Corp. v. Carol Wright Sales, Inc.*, 18 F.3d 502 (7th Cir. 1994) (duffel bags); *North Coast Indus. v. Jason Maxwell, Inc.*, 972 F.2d 1031 (9th Cir. 1992) (fabric designs); *Eales v. Environmental Lifestyles, Inc.*, 958 F.2d 876 (9th Cir.) (architectural plans), *cert. denied*, 113 S. Ct. 605 (1992); *Sid & Marty Krofft Television Prods. v. McDonald's Corp.*, 562 F.2d 1157 (9th Cir. 1977) (puppet characters and television show).

Ninth Circuit's anomalous "virtually identical" infringement standard. It is the function of all language and art "to facilitate communication."[15]

Indeed, given the highly creative nature of Apple's works,[16] they would not deserve a lesser degree of protection even if they served a functional purpose less exalted than communication. As this Court has explained in granting copyright protection to a statuette of dancing figures used as a table lamp base, "[w]e find nothing in the copyright statute to support the argument that the intended use or use in industry of an article eligible for copyright bars

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[15] *See* John Kissick, *Art: Context and Criticism* 21 (1993) ("Visual images are one of the most basic forms of communication available to the human community."); *cf. Apple Computer, Inc. v. Franklin Computer Corp.*, 714 F.2d 1240, 1252 (3d Cir. 1983) ("the medium is not the message"), *cert. dismissed*, 464 U.S. 1033 (1984).

[16] It is well recognized that computer software has a large component of aestheticism, whether viewed from the vantage point of conceiving an imaginative approach to accomplishing a program objective, literary programming style or, in the case of interface screen displays, artistic sensory appeal. *See, e.g.*, Frederick P. Brooks, *The Mythical Man-Month* 7 (1975) ("The programmer, like the poet, works only slightly removed from pure thought-stuff. He builds his castles in the air, from air, creating by exertion of the imagination."); Susan Lammers, *Programmers at Work* 64 (1989) ("'Stylistic distinctions of different programs are intriguing, very much like the differences art critics might see between Leonardo's Mona Lisa and a Van Gogh.'" (quoting Gary Kildall, author of CP/M, a principal early operating system)); *Apple Computer, Inc. v. Mackintosh Computers Ltd.*, 28 D.L.R.4th 178, 184 (Can. Fed. Ct. 1986) ("There is no doubt that computer programs are highly individualistic in nature and contain a form of expression personal to the individual programmer."); Anthony L. Clapes, *Software, Copyright, & Competition: The "Look and Feel" of the Law* 115-16 (1989) (stating that the writing of programmers is "constrained more by the author's imagination than by the relatively weak constraints imposed by the nature of the desired result"); Arthur R. Miller, *Copyright Protection for Computer Programs, Databases, and Computer-Generated Works: Is Anything New Since CONTU?*, 106 Harv. L. Rev. 977, 983 n.21 (1993) (citing authorities referring to the "creativity, originality and insight" involved in the creation of a computer program and its user interface and describing computer software as "the ultimate creative medium").

or invalidates its registration. We do not read such a limitation into the copyright law." *Mazer v. Stein*, 347 U.S. 201, 218 (1954).[17]

Moreover, the treatment of computer programs or graphics as if they were non-protectible "functional" works is flatly inconsistent with the Software Protection Act of 1980.[18] The 1980 legislation resulted from the recommendations of a three-year study conducted by a congressionally established National Commission on New Technological Uses of Copyrighted Works (CONTU) in a Final Report transmitted to the President on July 31, 1978.[19] The dissenters opposed the legislation because they viewed a computer program as "a machine-control element, a mechanical device," analogous to a cam controlling a drill. CONTU Report at 27-29 (dissent of Commissioner John Hersey). The majority of the Commission—whose recommendations were adopted by Congress—answered that "[p]rograms should no more be considered machine parts than videotapes should be considered parts of projectors or phonorecords parts of sound reproduction equipment." *Id.* at 21. The decisions below, adopting the minority view

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[17] That is the rule in all countries subscribing to the Berne Convention. See the *WIPO Guide to the Berne Convention* 2-1 (1978), explaining that a work "may be produced . . . with a merely utilitarian or commercial aim, without this making any difference in the protection it enjoys."

[18] Pub. L. No. 96-517, § 10(a), 94 Stat. 3028 (1980) (codified as amended at 17 U.S.C. § 101 (1980)) (including a computer program within the copyright category of literary works). *See also* H.R. Rep. No. 1476, 94th Cong., 2d Sess. 51, 54 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659.

[19] The CONTU Report is generally recounted in *Apple Computer, Inc. v. Franklin Computer Corp.*, 714 F.2d 1240, 1247-48 (3d Cir. 1983), *cert. dismissed*, 464 U.S. 1033 (1984).

(almost literally in metaphorical analogy), impermissibly repudiate the congressional enactment.[20]

Nor can the "virtually identical" standard be justified by analogizing computer graphical user interfaces to factual or other non-creative works or compilations.[21] In a July, 1991 opinion, the district court correctly stated that "[t]he component elements of Apple's works which defendants contend are not original do not appear to be unprotectible and unoriginal facts of the type described in *Feist* and *Harper & Row*." Order of July 25, 1991 at 3-4 (App. at 78A). The nature of Apple's graphical user interface did not

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[20] The district court also advanced a variation on its "functionality" theme by stating a policy favoring "compatible" graphical user interface "standards." 799 F. Supp. at 1025 (App. at 115A). But Congress has not entrusted to the courts the prerogative of negating copyright protection to permit the copying of an attractive work in order to make it a "standard." *See Lotus Dev. Corp. v. Borland Int'l*, 788 F. Supp. 78, 91 (D. Mass. 1992) ("Congress (but not this court) is free to change [the] balance" struck with respect to the copyrightability of computer programs). Likewise, that it appeared to the district court (wrongly from Apple's point of view) that Apple has received sufficient reward for the success of its copyrighted graphical user interface [799 F. Supp. at 1025 (App. at 115A)] does not provide a sound jurisprudential basis for disallowing the protection against copying to which Apple's works are entitled by a uniform application of copyright law. Such rulings should not stand uncorrected.

[21] The court of appeals cited *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991) (holding that a telephone white pages directory lacked the requisite originality to qualify for copyright protection), in support of its ruling.

Both the district court and the court of appeals derived the "virtually identical" rule principally from *Harper House, Inc. v. Thomas Nelson, Inc.*, 889 F.2d 197 (9th Cir. 1989), *cert. denied*, 114 S. Ct. 1058 (1994). *See* 799 F. Supp. at 1023, 1039 (App. at 111A, 140A); 35 F.3d at 1446 (App. at 19A). *Harper House* involved a personal organizer called "Day Runner," a compilation of various forms and collections of data to assist a user in planning a daily schedule. The court of appeals did not take note that a subsequent defense summary judgment ruling was reversed (in an opinion marked not for publication), 5 F.3d 536 (9th Cir. 1993) (table), *cert. denied*, 114 S. Ct. 1058 (1994).

change thereafter. It remained a distinctive original work of creative artistry permeated with fanciful imaginary features designed for their aesthetic appeal as well as their informational function.[22]

Feist explains that the rationale for treating facts as non-protectible is their lack of originality. That rationale has no application to the case of complex computer software. As Professor Gorman has written, "the basic distinction between fact works and works of fancy is . . . valid and of significance for copyright analysis." Robert A. Gorman, *Fact or Fancy? The Implications for Copyright*, 29 J. Copyright Soc'y 560, 563 (1982) (summarizing reasons at 562). *Cf.* Jon S. Wilkins, *Protecting Computer Programs as Compilations Under Computer Associates v. Altai*, 104 Yale L.J. 435, 452-53, 462 (1994) ("[T]he range of options in designing a program is almost unlimited . . . ." Thus, "[t]he structure and design of computer programs reflect significant authorial presence.").

The same distinction is equally valid for "compilations" since, as a matter of statutory definition, Apple's works clearly are ***not*** works "formed by the collection and assembling of *preexisting* materials or of data." 17 U.S.C. § 101 (emphasis added); *see* 1 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 3.02, at 3-5 (1993) ("[A] compilation consists merely of the selection and arrangement of *preexisting material without any internal changes in such material.*" (emphasis added)). The irreducible fact is that every element of Apple's works was

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[22] The evidence is abundant that Apple's works reflect a large measure of creative artistry and are valued for their highly aesthetic quality. [CR 470 (Ex. P)] The designers of the Macintosh interface focused on its "aesthetic appeal," the creation of "works that were graphically rich and appealing." [CR 231 (Atkinson ¶ 5)]

created by the imagination (not just the hand) of an Apple graphic designer.[23]

Thus, the decision below was based on a fundamental misapplication of this Court's *Feist* decision and on a basic misunderstanding of the Copyright Act itself.[24]

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[23] See, e.g., CR 473 (Wagner (Laserdisc)) ("Our goal was to make the interface as engaging and attractive as possible . . . the details . . . were carefully developed in order to create graphical designs that were truly unique to Apple."); CR 229 (Wagner Decl. ¶ 3) ("Our work on the Lisa user interface was original and unique, the result of a pains-taking iterative design process."); CR 228 (Capps Decl. ¶ 3) ("The design of the Macintosh user interface . . . require[d] the development and consideration of numerous alternative designs . . . to obtain the look and the animation that we wanted."); CR 231 (Atkinson ¶¶ 5, 15) ("[T]he design of the interfaces was our original creation.").

See also Jon S. Wilkins, *Protecting Computer Programs as Compilations Under Computer Associates v. Altai*, 104 Yale L.J. 435, 462 (1994) (footnote omitted):

> [W]hile a phone book provides a paradigmatic example of a low-authorship work afforded little protection by copyright, all works containing compilation expression should not be characterized as low-authorship works. Highly imaginative selection and arrangement expression may exhibit significant authorial presence that should receive more protection than the minimally creative selection and arrangement of a factual directory."

[24] The district court also attempted to justify its "virtual identicality" ruling by attacking the originality of all interactive works on the ground that the user rather than the interface designer provides the originality. *See* 799 F. Supp. at 1022 (App. at 110A). Although the court of appeals did not necessarily endorse that ruling [*see* 35 F.3d at 1444 (App. at 15A)], the growing importance of user interaction in various kinds of computer and multimedia programs makes explicit correction of the district court's dangerously erroneous ruling a matter of urgent priority.

B. The Process of "Dissection and Filtration" Is Inappropriate for Audiovisual Works, Is Severely Flawed and Is the Subject of Disagreements Among the Circuit Courts that Have Created Widespread Confusion and Intolerable Uncertainty in the Computer Industry.

The applicability of the "dissection and filtration" process utilized by the court below to determine the standard of protection for graphical user interfaces is highly questionable. As explained by the district court below in an earlier decision (unfortunately later ignored) [Order of July 25, 1991 at 4 (App. at 78A)]:

> [A] test of originality for constituent elements of a copyrighted work, as proposed by defendants, would, in effect, preclude copyright protection for all pictorial works, which, if dissected, would be composed of a limited number of geometric shapes.[25]

It is essentially for that reason that, as recently stated in a photograph case, "[m]any courts . . . have ruled that [dissection into nonprotectable elements] is not the correct way to approach the issue of copyright protection" and that "proper analysis requires that all of the elements be considered as a whole." *Wallace Computer Servs., Inc. v. Adams Business Forms, Inc.*, 837 F. Supp. 1413, 1418 (N.D. Ill. 1993). Indeed, the seminal computer software "dissection and filtration" case, *Computer Assocs. Int'l v. Altai, Inc.*, 982 F.2d 693, 703 (2d Cir. 1992), explicitly excluded its application to cases involving graphical user interfaces. That distinction makes sense given that, "of all the elements of a program, the user interface represents the feature that

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[25] *See also* Michelle Brownlee, Note, *Safeguarding Style: What Protection Is Afforded to Visual Artists by the Copyright and Trademark Laws?*, 93 Colum. L. Rev. 1157, 1167 (1993) (stating that the "total concept and feel" test "may prove particularly useful when applied to visual art works, which cannot be parsed easily into discrete segments or sequences").

is most obviously comparable to works traditionally protected by copyright." Anthony L. Clapes, *Software, Copyright, and Competition: The "Look and Feel" of the Law* 203 (1989).[26]

Considered in its own terms, *Computer Associates* reflects a phobic view of computer programs as "essentially utilitarian in nature" and ill suited to copyright protection,[27] views echoed in the decision below.[28] Both decisions evince a hostility to the protection of computer software that has produced a flawed process, inconsistent with the Software Protection Act of 1980 and inappropriately skewed against protection. *See* Jack E. Brown, *"Analytical Dissection" of Copyrighted Computer Software—Complicating the Simple and Confounding the Complex*, 25 Ariz. St. L.J. 801, 817, 829-40 (1993). Among

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[26] The author also explains in a telling statement [*id.*]:

> Because the look and feel of a program is the part of the program with which the user most closely identifies, and the part of the program that cannot be hidden from competitors, there would be absolutely no point in investing in development of innovative user interfaces if the results of those investments could be freely copied by others.

[27] 982 F.2d at 704-05, 708.

[28] *See* 35 F.3d at 1443-44 (App. at 13A-14A); *see also* 799 F. Supp. at 1020 n.11, 1023, 1025 (App. at 106, 110A-111A, 115A).

The fear of extending copyright protection to computer software expressed in *Computer Associates* and in this case was voiced in similar terms by the courts first confronting other new technologies and media of expression, from photography to sound recording. *See* Arthur R. Miller, *Copyright Protection for Computer Programs, Databases, and Computer-Generated Works: Is Anything New Since CONTU?*, 106 Harv. L. Rev. 977, 982 nn.12, 13 (1993). Economic analysis and history both have shown such concerns to be "overstated." *See* Kenneth W. Dam, *Some Economic Considerations in the Intellectual Property Protection of Software* 19-20 (Chicago Law & Economics Working Paper No. 26, 2d series, 1994).

other harsher comments,[29] the *Computer Associates* case has been pointedly criticized on the ground that it "betrays a fundamental underlying disagreement with the Congressional decision mandate making copyright a means of protecting software" and "[a]t the same time . . . overlooks the well-established proposition that a work composed entirely of unprotectable separate elements must nonetheless be protected if those elements are combined in a sufficiently original fashion." Kenneth W. Dam, *Some Economic Considerations in the Intellectual Property Protection of Software* 25 (Chicago Law & Economics Working Paper No. 26, 2d series, 1994) (forthcoming 1995 in J. Legal Stud.). *See also* Jon S. Wilkins, *Protecting Computer Programs as Compilations Under Computer Associates v. Altai*, 104 Yale L.J. 435, 456-57 (1994) (recommending that *Computer Associates* be modified so as to protect the original structure or the original selection, arrangement and coordination of computer programs).

Moreover, those courts that have followed the lead of *Computer Associates* have taken different approaches, creating what the Fifth Circuit Court of Appeals has "generously described" as "a state of creative ferment concerning the methods by which nonliteral elements of computer programs may be identified and analyzed for copyrightability" [*Engineering Dynamics, Inc. v. Structural Software, Inc.*, 26 F.3d 1335, 1341 (5th Cir. 1994) (referring to inconsistent decisions in the First, Second, Third, Fifth, Ninth and Tenth Circuits)].

In particular, there is a sharp split among the circuits that have employed a version of the "dissection and filtration" approach as to whether a comparison between the plaintiff's work and the defendant's work should be made

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[29] One article described the case as "a catastrophe" in three dimensions (for the software industry, for copyright law and for the parties) and a "legal Chernobyl." Anthony L. Clapes & Jennifer M. Daniels, *Revenge of the Luddites: A Closer Look at Computer Associates v. Altai*, Computer Law., Nov. 1992, at 11, 11.

before the dissection and filtration or afterwards. In *Gates Rubber Co. v. Bando Am., Inc.* the district court held that "[a]ny sifting or dissecting of protectable from unprotectable elements" must follow viewing of the works as a whole. 798 F. Supp. 1499, 1517 (D. Colo. 1992). The Tenth Circuit specifically approved that approach, explaining that "a court will often be assisted in determining the factual issue of copying if both programs are first compared in their entirety without filtering out the unprotected elements." 9 F.3d 823, 841 (10th Cir. 1993).[30] The Ninth Circuit's decision in this case is directly to the contrary. *See* 35 F.3d at 1445 (App. at 17A-18A) (noting difference with *Gates*). Significantly, the Ninth Circuit directs that "the unprotectable elements have to be identified, or filtered, *before* the works can be considered as a whole." 35 F.3d at 1446 (App. at 19A) (emphasis added).

Numerous attempts by different courts and commentators to understand and explain these diverse and inconsistent approaches already consume thousands of pages. What is now urgently needed by the young and fast-developing computer software industry, composed of thousands of small companies dependent on copyright protection,[31] is a decision of this Court that will dispel the present "stultifying" confusion thwarting progress in the most dynamic of the "useful arts."[32]

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[30] *See also John Richardson Computers Ltd. v. Flanders*, 1993 Fleet Street Reps. 497 (Ch.) (available in LEXIS, Enggen library, Cases file) (citing *Computer Associates* but first deciding "whether the plaintiff's program as a whole is entitled to copyright and then decid[ing] whether any similarity attributable to copying . . . amounts to the copying of a substantial part of the plaintiff's program").

[31] As of May 21, 1991, it was reported that there were 50,000 companies in the worldwide computer industry. Victor Siber, Address before the Annenberg Foundation, May 21, 1991, at 3.

[32] See Steering Committee for Intellectual Property Issues in Software et al., National Research Council, *Intellectual Property Issues in Software* 58-60 (1991), quoting Robert Spinrad, Director, Corporate Technology, Xerox Corp.:

C. This Case Is an Appropriate, and in Some Respects an Ideal, Vehicle for Resolution by This Court of the Issues Presented.

The simplicity of Apple's claim makes it an ideal case for review of the questions presented. Apple's claim is simply that its copyrighted works were infringed by deliberate copying of their overall arrangement, viewing the works as a whole as they are viewed by users.[33] Such a

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> [T]here is a stultifying, dulling effect—in some cases subtle, [in others] not so subtle—[resulting from] the confusion that has arisen in this field, which is slowing down activity. It is slowing down the small companies, . . . and it is slowing down the large companies.

See also the quotation from Lewis Branscomb, Director, Science, Technology and Public Policy Program, Harvard University *[id.]:*

> Even the possibility that the legal basis for a stable, functional marketplace for computer software might be threatened is enough to create alarm in the industry, . . . one of the few high-tech industries in which U.S. firms still enjoy a commanding position in international trade.

[33] *See Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106, 1109 (9th Cir. 1970) ("[P]roper analysis of the problem requires that all elements of each card, including text, arrangement of text, art work, and association between art work and text, be considered as a whole."); *M. Kramer Mfg. Co. v. Andrews*, 783 F.2d 421, 439 (4th Cir. 1986) ("[I]n reviewing a derivative work for originality, it is not sufficient to consider the matter by looking at the component parts: the work must be reviewed as a whole, not just reviewed or analyzed part by part."); *Apple Barrel Prods., Inc. v. Beard*, 730 F.2d 384, 388 (5th Cir. 1984) (holding that it was error to analyze copyrightability of country music show in terms of separate aspects of script, design and format and stating that "[t]he mere fact that component parts of a collective work are neither original to the plaintiff nor copyrightable by the plaintiff does not preclude a determination that the combination of such component parts as a separate entity is both original and copyrightable"); *Raffoler, Ltd. v. Peabody & Wright, Ltd.*, 671 F. Supp. 947, 950 (E.D.N.Y. 1987) (rejecting a challenge to the validity of plaintiff's copyrights on advertisements as "not worthy of copyright protection because their components, *e.g.*, the

case paradigmatically should not require violating the integrity of the works as a whole and radically downgrading the infringement standard. That must be especially so where, as in this case, the "'synergy of . . . nonprotectible elements . . . creates a whole that is greater than the sum of its parts.'" *Atari Games Corp. v. Oman*, 979 F.2d 242, 244 (D.C. Cir. 1992) (quoting *Stillman v. Leo Burnett Co.*, 720 F. Supp. 1353, 1361 (N.D. Ill. 1989)).[34] The treatment of the case by the court of appeals, reviewing essentially only "the district court's *approach*" [35 F.3d at 1438 n.5 (App. at 3A)], further facilitates review by this Court of those important questions.[35]

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slogans, title, layout, etc. could not be individually protected"); *see also Atari, Inc. v. North Am. Phillips Consumer Elecs. Corp.*, 672 F.2d 607, 618 (7th Cir.) (cautioning against dissection that might cause a viewer to "lose sight of the forest for the trees"), *cert. denied*, 459 U.S. 880 (1982).

[34] *See also Ruolo v. Russ Berrie & Co.*, 886 F.2d 931, 939-40 (7th Cir. 1989) ("While it is true that [certain "elements of similarity"] are not individually capable of protection, just as individual words do not deserve copyright protection, it is the unique combination of these common elements which form the copyrighted material."), *cert. denied*, 493 U.S. 1075 (1990); Arthur R. Miller, *Copyright Protection for Computer Programs, Databases, and Computer-Generated Works: Is Anything New Since CONTU?*, 106 Harv. L. Rev. 977, 1006 (1993) ("Any process that atomizes a work runs the risk of reducing it to a collection of unprotectable elements and may ignore the synergism inherent in the combination of its constituent elements."); Rudolf Arnheim, *New Essays on the Psychology of Art* 21 (1986) ("We must be able to see where in such [an organized] whole any particular component is located . . . . Intuition complements this [intellectual approach of synopsis] by grasping the whole structure in simultaneity and seeing each component in its place in the total hierarchy." (footnote omitted)).

[35] Where the court did consider a detail, it did so only in terms of essentially irrelevant generalities. Thus, the court stated, as a generality, that "hardware constraints limit the number of ways to depict visually the movement of a window on the screen." 35 F.3d at 1445 (App. at 16A). The generality is unexceptionable (there inevitably are constraints imposed by the choice of any medium for expression, whether on paper or

Likewise, approval by the court of appeals in this case of "filtering out" the elements it deemed to be "licensed elements" under the 1985 Apple-Microsoft agreement presents in sharp relief the dangers of a blanket, indiscriminate use of the "filtration" process. That an item may be unprotect***ed*** because of a license does not imply that it is unprotect***ible*** as a matter of law. If anything, the fact that the item was licensed suggests that it has value as an item of copyrightable expression. Recognizing, then, that the judicial objective is to ensure that copyright protection is afforded only to copyrightable expression and not to an unprotected idea [*see Sid & Marty Krofft Television Prods. v. McDonald's Corp.*, 562 F.2d 1157, 1163 (9th Cir. 1977)], there is no reason to eliminate "licensed elements" from consideration of copyrightability or to downgrade the standard of protection. It should be quite enough to take the license into account in the jury's consideration of infringement and the computation of damages.

Counting the licensed elements as if each had equal value in order to conclude that the license authorized copying of 90% of the similar features in Windows 2.03 and 3.0 and two-thirds of the features in NewWave [35 F.3d at 1442 (App. at 11A)] affords even less warrant for downgrading the protection to be accorded to Apple's works against copying of the ***un***licensed aspects thereof—particularly given the change in the total appearance and character of the work stemming from the pervasive use of overlapping instead of tiled windows. It is a first maxim of copyright law that "[e]ven if a copied portion be relatively small in proportion to the entire work, if qualitatively important, the finder of fact may find substantial similarity." *Baxter v.*

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a motion picture or computer screen), but irrelevant in the context of this case where the evidence is clear that, at least by the time Microsoft introduced Windows 3.0, there was no relevant "hardware constraint" that required Microsoft and Hewlett-Packard to mimic the Macintosh interface. [CR 260 (Konzen); CR 596 (Boyer), (Trower); CR 553 (Foley)]

MCA, Inc., 812 F.2d 421, 425 (9th Cir.) (jury question presented as to similarity of theme music, rejecting argument that similarity in a six-note sequence is not protectible expression), *cert. denied*, 484 U.S. 954 (1987).[36] Analogously, it is reported that chimpanzees and humans have about 98% of their DNA in common.[37] It is not the quantity but the nature and quality of what is different that is decisive.[38]

Moreover, downgrading the standard for protection of a work because of a license of some "individual elements" thereof is illogical (especially where, as in this case, it is the deliberate addition of additional ***un***licensed elements that has made the defendants' works so similar to Apple's copyrighted works). Providing a higher standard of protection against infringement of unlicensed elements by a

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[36] *See also Universal Pictures Co. v. Harold Lloyd Corp.*, 162 F.2d 354, 361 (9th Cir. 1947) ("The whole picture need not be copied to constitute infringement. The mere copying of a major sequence is sufficient."); *Whelan Assocs. v. Jaslow Dental Lab.*, 797 F.2d 1222, 1246 (3d Cir. 1986) ("Because all steps of a computer program are not of equal importance, the relevant inquiry cannot therefore be the purely mechanical one of whether most of the programs' steps are similar. Rather, because we are concerned with the overall similarities between the programs, we must ask whether the most significant steps of the programs are similar."), *cert. denied*, 479 U.S. 1031 (1987); *SAS Inst., Inc. v. S & H Computer Sys., Inc.*, 605 F. Supp. 816, 829-30 (M.D. Tenn. 1985) (forty-four specific examples of copying from 186,000 lines of code held not insubstantial; "even a quantitatively small fragment ('a rose by any other name would smell as sweet') may be qualitatively substantial").

[37] Ellen R. Shell, *Mix 'n' Match DNA*, Science, July-Aug. 1984, at 88.

[38] *See also* Jon S. Wilkins, *Protecting Computer Programs as Compilations Under Computer Associates v. Altai*, 104 Yale L.J. 435, 460-64 (1994) (explaining the relationship of "*qualitative* similarity" to broad protection for creative work such as program design: "[A]n infringing work need not copy virtually all of a copyrighted program's structure, nor precisely follow the selection and arrangement. Instead, infringement liability should attach for copying any significant integrated portion of program structure in a way that suggests clear parallels to the original's selection and arrangement.").

non-licensee than by a partial licensee is entirely irrational and paradoxical and would risk the mischievous unintended consequence of discouraging partial licenses.

With respect to the Microsoft license, we note particularly that the copyright law questions presented may be considered free of any contract interpretation issue that was considered below. For purposes of this petition, it may be assumed that the courts below correctly interpreted the 1985 Apple-Microsoft agreement. The copyright issues presented are the same however the license agreement is interpreted.

This case also presents an opportunity for the Court, if it chooses to do so, to resolve the other important related copyright issue of identifying the questions that can be resolved by the court (under Federal Rule of Civil Procedure 56) and those that should be reserved for jury determination.

The court of appeals in this case clearly approved the district court acting as the factfinder in lieu of the jury, performing the functions of "weighing of the evidence, and the drawing of legitimate inferences from the facts" [*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)], where there was conflicting evidence and disputed facts concerning the originality and indispensability of every detailed "element" of Apple's works that the court considered, including a judgmental finding that protectible elements (e.g., the zooming rectangles animation that accompanies the opening and closing of Apple's windows) were "relatively minor" and "lack qualitative significance" [821 F. Supp. at 623-24 (App. at 175A-176A)]. The district court avoided the limitations of Rule 56 by holding that the enunciation of the respective roles of the court and jury in *Shaw v. Lindheim* was confined to literary works and "does not extend to visual displays" [799 F. Supp. at 1020 (App. at 105A)]—a forced and illogical distinction. The court of appeals seemingly approved of that limitation of *Shaw*, but also excused avoidance of Rule 56 on the ground that "Apple could have gone to the jury under a virtual identity

standard." 35 F.3d at 1447 (App. at 20A).[39] Self-evidently, that excuse cannot serve as a bootstrap to justify the judicial factfinding which the district court relied upon to downgrade the copyright protection sought to a "virtual identity" standard. Moreover, that excuse could not in any event justify the "virtual identity" standard since it was an erroneous standard however the district court arrived at it.

The additional issue is purely an optional one, not required to decide the other issues presented or in any respect treat with Apple's claim as to originality or protectibility of its works as a whole (which was established beyond fair dispute [*see* 759 F. Supp. at 1453-55 (App. at 62A-68A)]). We suggest, however, that it would be of assistance to lower courts to have this Court's direction as to the applicability of Rule 56 in all copyright cases involving original creative works.

Finally, it deserves emphasis that the denigration of copyright protection effected by the decision below can quickly spiral into uncontrollable and irremediable damage to the highly vulnerable, copyright-dependent software industry. Accordingly, correction of the errors below in this case offers the special advantage of timeliness.

Conclusion

For the reasons stated, this Court should grant the writ requested to review the significant copyright questions and resolve the irreconcilable conflicts among several circuit courts as to critical issues that today plague the computer industry. Timely review of the issues involved, dramatically presented in this case, is required to avoid the severe root

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[39] The court of appeals had so confined *Shaw v. Lindheim*, 919 F.2d 1353, 1357-61 (9th Cir. 1990), in *Pasillas v. McDonald's Corp.*, 927 F.2d 440, 442-43 (9th Cir. 1991). In this case, the court of appeals said that "[w]e don't have to resolve whether audiovisual works such as GUIs are more similar to Man in the Moon masks [as in *Pasillas*] than to scripts [as in *Shaw*], however. Apple could have gone to the jury under a virtual identity standard, but elected not to." 35 F.3d at 1447 (App. at 20A).

damage to the American economy that is threatened by the decision below.

In addition, the legal significance of the questions presented, the economic impact of the decision below on the computer industry and the economic consequences of that decision on the innovative role of American industry in the highly competitive world economy are of such significance that we respectfully suggest that the Court request the views of the United States.

Respectfully submitted,

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